

9801

1245

DOCKET NUMBER 50-275/323 - FDR
PROD. & UTIL. FAC.

LOCAL UNION

DOCKETED
USNRCP.O. Box 4790
Walnut Creek
CA 94598
3083 Citrus Circle
415 933.6000
FAX 415 933.0118

'90 FEB -2 P2:40

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH**IBEW**International
Brotherhood of
Electrical
Workers, AFL-CIO

February 2, 1990

VIA TELECOPIERSamuel J. Chilk, Secretary
ATTENTION: Emil Julian
Chief, Docketing and Service Branch
United States Nuclear Regulatory Commission
Washington, D.C. 20555Jack McNally
Business ManagerHoward Stiefer
PresidentRE: Hiatt et al vs. Pacific Gas and Electric
Company, United States Nuclear Regulatory
Commission, Intervenor (United States District
Court, Northern District of California Case No.
C 89-4569 FMS)

Dear Mr. Chilk:

Pursuant to Rule 18 of the Federal Rules of Appellate Procedure, the plaintiffs in the above-noted case hereby apply for a partial stay of the Commission's Final Rule and Statement of Policy concerning Fitness-for-Duty Programs as applied to certain employees at the Pacific Gas and Electric Company's Diablo Canyon Nuclear Power Plant in Avila Beach, California, pending review of this matter in the Ninth Circuit Court of Appeals.

Specifically, plaintiffs request that the Commission stay unannounced tests imposed in a random manner (26 CFR 26.24(a)(2)) for Pacific Gas and Electric Company employees at the Diablo Canyon Nuclear Power Plant who are members of the collective bargaining units represented by Local 1245 of the International Brotherhood of Electrical Workers, AFL-CIO, and the Engineers and Scientists of California, MEBA, AFL-CIO. By this application, the parties do not seek stay of any other portions of the Commission Fitness-for-Duty rule, nor do they seek stay of the random testing portion of that rule for any employees other than Diablo Canyon employees.

On December 29, 1990, Judge Thelton Henderson of the United States District Court, Northern District of California, issued a temporary restraining order prohibiting the Pacific Gas and Electric Company from conducting random testing of the employees for whom this application is filed. Shortly thereafter, Judge Fern Smith granted a motion for intervention filed by the United States Nuclear Regulatory Commission.

9002120351 900202
PDR ADOCK 05000275
G PDR

352

On January 31, 1990, Judge Smith heard argument in an Order to Show Cause Re: Preliminary Injunction, and announced her intention to transfer the litigation to the Ninth Circuit Court of Appeals. When Judge Smith actually transfers the case to the Ninth Circuit, she will dissolve the temporary restraining order which has been in effect since December 29, 1989, making this request for a stay necessary.

In support of this application for a stay, the applicants incorporate by reference the arguments which they have made in the pending litigation. Briefly summarizing these arguments, applicants note as follows: (1) a random urine collection and testing program constitutes substantial invasion of employee rights, which may be surrendered only for compelling and pressing reasons; (2) the safety record of Diablo Canyon is excellent, and the plant design features, redundancy of safety systems and work procedures on vital equipment, and extensive training for unexpected equipment and personnel malfunctions, all leave Diablo Canyon virtually fail-safe as far as the actions of a single individual are concerned; (3) the rule as applied to Diablo Canyon covers hundreds of workers who do not have access to radiologically controlled areas or vital access areas of the plant, and whose work never brings them into contact with systems or equipment whose failure could create challenges to safety systems or complicate the response to off-normal conditions; (4) there is no evidence of drug use or alcohol abuse by Diablo Canyon employees; (5) the drug testing technology to be used by PG&E does not, with the exception of alcohol, measure a worker's impairment, and drug testing should not be used to test the "integrity" of the workforce; and (6) given the claimed deterrent value of the types of testing which are not being challenged (pre-employment testing, for-cause testing, post-accident testing, and testing based on reliable information of drug use), and the absolute paucity of empirical evidence which would establish that random drug testing has ever significantly deterred drug use, random testing is not necessary to deter future drug use by Diablo Canyon employees. For these reasons, more fully articulated in the documents on file with the United States District Court, Northern District of California, applicants believe that the random testing portion of the rule is unconstitutional as applied to them and for that reasons request a stay pending review by the Ninth Circuit.

Copies of this application are being served by telecopier simultaneously with this filing on Lawrence J. Chandler, Assistant General Counsel for Hearings and Enforcement, United States Nuclear Regulatory Commission, and on Iathan T. Annand, lead counsel for the Pacific Gas and Electric Company in the litigation described above.

Thank you for your consideration of this application.

Sincerely,



Tom Dalzell

Attorney for Applicants Steven A. Hiatt et al.